

Nguyen (Migration) [2023] AATA 202 (9 January 2023)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mrs Thi Be Ba Nguyen
REPRESENTATIVE:	Mr Van Ngan Nguyen (MARN: 9366614)
CASE NUMBER:	1832869
HOME AFFAIRS REFERENCE(S):	BCC2016/3240467
MEMBER:	M. Edgoose
DATE:	9 January 2023
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa: • cl 820.211(2)(a) of Schedule 2 to the Regulations • cl 820.221 of Schedule 2 to the Regulations

Statement made on 09 January 2023 at 8:59am

CATCHWORDS

MIGRATION –Partner (Temporary) (Class UK) visa – Subclass 820 – parties validly married – Certificate of Marriage provided – mutual commitment to a shared life together – couple have lived together over six years – decision under review remitted

LEGISLATION

Migration Act 1958, ss, 5F, 65

Migration Regulations 1994, r 1.15, Schedule 2, cls 820.211, 820.221

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
2. The applicant applied for the visa on 29 September 2016 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl 820.211(2)(a).
4. The applicant appeared before the Tribunal on 30 November 2022 to give evidence and present arguments. The Tribunal also received oral evidence from Mr Quy Van Nguyen, the sponsor, Ms Maria Nguyen the sponsor's daughter, Ms Lisa Dang Lan Nguyen the granddaughter of the sponsor and Ms Thi Thu Thao Phan a friend of the sponsor's daughter. The Tribunal hearing was conducted with the assistance of an interpreter in the Vietnamese and English languages.
5. The applicant was represented in relation to the review.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

Whether the parties are in a spouse or de facto relationship

7. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is Australian citizen.
8. 'Spouse' is defined in s 5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s 5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in reg 1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in reg 1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

9. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The applicant submitted to the Department a copy of the couple's marriage certificate. The marriage certificate indicates that the marriage took place on 2 September 2016 at 8 Meehan Street, Cairnlea Victoria. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s 5F(2)(a).

Are the other requirements for a spouse relationship met?

10. On 8 October 2022 the applicant made several submissions to the Tribunal in support of her being in a genuine relationship with the sponsor. Included in this submission was a joint submission from the couple regarding their relationship, a few joint utility bills, airline tickets, the sponsors phone bills, joint bank statements, money transfers, photos of the couple and with third parties, and the applicant's tax documents.
11. The oral evidence the couple provided at the hearing was consistent and demonstrated that the couple do know each other very well and are in a genuine relationship. The witnesses also provided a sound knowledge of the couple and their relationship. Given the physical evidence provided to the Tribunal prior to the hearing and the consistent oral evidence provided at the hearing from both the couple and the witnesses the Tribunal is satisfied that the applicant and sponsor are in a genuine and continuing relationship.
12. The couple informed the Tribunal that they have no joint ownership of assets and no joint liabilities and no legal obligations owed to the other party. However, the couple do pool their limited financial resources and share day-to-day household expenses as indicated by the utility bills submitted on 8 October 2022. The couple informed the Tribunal that the applicant works part-time for Mizu Sushi, as indicated in the joint bank statement and the sponsor receives a Vietnam veterans' payment on a fortnightly basis that is paid into his individual bank account. The couple don't own any property but live in a residence owned by the sponsors daughter and pay rent in cash to the sponsors daughter. The couple pool their finances resources to pay for rent, food and all utility bills which primarily comes out of the joint account. The couple are also financially supported by their children in ensuring all day-to-day household expenses are paid on time. Although the couple have limited financial means the Tribunal is satisfied with the overall financial aspects of the relationship.
13. The couple have no joint responsibility for care and support of children of their own however one of the sponsor's granddaughters, Lisa one of the witnesses, lives with the couple. The sponsor has three adult children from a previous relationship and four grandchildren. The applicant has one adult son living in Australia and two adult children living back in Vietnam. The adult children of both the applicant and sponsor have their own families. The couple live together with Lisa one of the sponsor's granddaughters. The couple informed the Tribunal that primarily the applicant does most of the housework and together they take care of the garden and vegetable patch. The witnesses confirmed during the hearing that the couple work together as a normal couple in taking care of the nature of the household. Given the consistent oral responses provided throughout the hearing the Tribunal is satisfied with the overall nature of the household.
14. The couple informed the Tribunal that people know they are married to each other as they are always together, and they have wedding rings to prove that they are married. The couple told the Tribunal that their friends and acquaintances are all very supportive about the nature of the relationship. The sponsor informed the Tribunal that he was not able to find the photos of their wedding ceremony. The couple both stated to the Tribunal individually that seven people attended the wedding ceremony. Although unusual the Tribunal accepts the

consistent response regarding the loss of photos of the wedding ceremony. In regard to joint social activities the couple regularly visit the Buddhist temple, go to the beach together and on weekends go to the second-hand market in Geelong. The three witnesses provided consistent oral evidence in support of the social aspects of the relationship between the couple. Overall, the Tribunal is satisfied with the social aspects of this relationship.

15. The couple first met in January 2016 through a mutual friend of the applicant. The applicant's friends had organised a dinner with the sponsor attended. At this dinner the sponsor gave the applicant his telephone number. Over the proceeding months the relationship between the couple developed. In July of 2016 the couple became engaged and married on 2 September 2016. Since 2 September 2016 the couple have lived together, over six years. The degree of companionship and emotional support they draw from each other is through talking everything through and supporting each other. Both stated to the Tribunal that they see this relationship as a long term one. Although the couple have provided limited physical evidence the Tribunal is satisfied with the consistent oral evidence provide at hearing regarding the nature of the persons' commitment to each other.
16. As indicated throughout this decision the Tribunal acknowledges that the witnesses provided consistent evidence regarding the couple being in a genuine relationship. For these reasons the Tribunal places significant weight on the oral evidence provided at hearing by the witnesses.
17. Based on the evidence, the Tribunal is satisfied the couple were married to each other under a marriage that is valid for the purpose of the Act. Although the overall evidence is limited, the Tribunal is satisfied the couple have a mutual commitment to a shared life as a married couple to the exclusion of all others, that the relationship between them is genuine and continuing and that they do not live separately and apart on a permanent basis.
18. On the basis of the above the Tribunal is satisfied that the requirements of s 5F(2) are met at the time the visa application was made and the time of this decision.
19. Therefore, the applicant meets cl 820.211(2)(a) and cl 820.221.
20. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

21. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
 - cl 820.211(2)(a) of Schedule 2 to the Regulations
 - cl 820.221 of Schedule 2 to the Regulations

M. Edgoose
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).